May 31, 1927

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In the Supreme Court of the United States

OCTOBER TERM, 1926.

No. 164

JUAN C. GALLARDO, TREASURER,
Defendant-Appellant,

vs.

EASTERN FERTILIZER COMPANY,
Complainant-Appellee.

Appeal from the District Court of the United States for the District of Porto Rico, Transferred from the United States Circuit Court of Appeals for the First Circuit under the Act of September 14, 1922.

MOTION OF APPELLANT TO TRANSFER THE CASE BACK TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT,

AND

BRIEF IN SUPPORT OF SUCH MOTION.

WILLIAM CATTRON RIGBY,
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Attorney for Appellant.

GEORGE C. BUTTE,
Attorney General of Porto Rico,
Of Counsel.

SUBJECT-INDEX.

	Page
MOTION	1–2
BRIEF	3–19
Statement of the Case	3–6
General Statement	3–5
Resumé of issues presented by complainant's bill	5–6
Point I. Appeal was properly taken from District Court to Circuit Court of Appeals	7–14
Point II. *Appellee* in its original brief and argument in the Circuit Court of Appeals *admitted that other federal questions*, besides constitutional questions, were *involved*, and argued those questions; it is now estopped to turn around and say that its bill involves only constitutional questions	14–18
Point III. *Appellant's express admission* in Circuit Court of Appeals that Congress had power to authorize the Legislature of Porto Rico to tax imports in original packages (hence, that question involved is only of intent of Congress; i. e., of construction of federal statutes;—and that appellee itself did not consider any substantial constitutional question involved.)	18
CONCLUSION	19
APPENDIX 1. Excerpt from "Brief of Complainant-Appellee" in Circuit Court of Appeals	21–24
APPENDIX 2. Quotations from authorities cited	25–31
1. Although a constitutional question may be involved; yet, if case also involves other federal questions, *defeated party may elect* whether to go to Supreme Court or to Circuit Court of Appeals	25–27
2. Mere assertion in the pleadings of a constitutional question is ineffective to sustain direct appeal to Supreme Court; *unless* the question so presented be actually substantial, really arising on the facts alleged in the bill, and not foreclosed by previous decisions of Supreme Court	27–31

TABLE OF CASES CITED

Page

Alaska *vs.* Troy, *258* U. S. 101 11
Balzac *vs.* Porto Rico, *258* U. S. 298 11
Benedicto *vs.* West India, etc. Cable Co., *256* Fed. 417 Appendix, *24*
Binns *vs.* United States, 194 U. S. 486 11
Dooley *vs.* United States, *182* U. S. *222* 10
Dorr *vs.* United States, 195 U. S. 138 10
Equitable Lf. Assur. Soc. *vs.* Brown, 187 U. S. 308 *9, 29-30, 30*
Farrell *vs.* O'Brien, 199 U. S. 89 ..... 9, 30
Fayerweather *vs.* Ritch, 195 U. S. *276* 30
Hamblin *vs.* Western Land Co., 147 U. S. 531 ..... *28*
Harris *vs.* Rosenberger, 145 Fed. 449 ..... *8, 25-27, 27*
Heitler *vs.* United States, *260* U. S. 438 ..... 9, 18, 31
Hooper *vs.* Remmel, 165 Fed. 336 ..... *8, 27*
Huguley Mfg. Co. *vs.* Galeton Cotton Mills, 184 U. S. 290 *26*
Kepner *vs.* United States, 195 U. S. 100 ..... Appendix, *24*
McMillan Co. *vs.* Abernathy, *263* U. S. 438 8
Merriam *vs.* Syn. Pub. Co., *237* U. S. 618 ..... 9, 30-31
National Prohibition Cases, *253* U. S. *350* 31
Newburyport Water Co. *vs.* Newburyport, 193 U. S. 561 30
New Orleans *vs.* New Orleans Waterworks Co., 142 U. S. 79 ..... *28*
New Orleans Waterworks Co. *vs.* Louisiana, 185 U. S. 336 ..... 9, *27-29*, 30
Parsons *vs.* District of Columbia, 170 U. S. 45 10
Piedmont Power & Lt. Co. *vs.* Graham, *253* U. S. 193 9
Rafferty *vs.* Smith, Bell & Co., *257* U. S. *226* 11
Salinger *vs.* United States, *272* U. S. 542 19
Smith *vs.* Apple, *264* U. S. *274, 277* 8
Spreckels Sugar Refining Co. *vs.* McClain, 192 U. S. *397* *8, 25, 27*
St. Joseph & Grand Island R. Co. *vs.* Steele, 167 U. S. 659 ..... *28-29*
Sugarman *vs.* United States, *249* U. S. 182 ..... 9, 31
United States *vs.* Heinszen & Co., *206* U. S. 370 10
Wilson *vs.* North Carolina, *169* U. S. 586 ..... *29*

CONSTITUTION AND STATUTES CITED.

CONSTITUTION

Art. I, Sec. 8, Cl. 3, "Commerce Clause" . . 6, 10, 11–13, 24
Art. I, Sec. 10, Cl. 2 . . . . . 23, 24

UNITED STATES STATUTES

Act of January 28, 1915, amending Judicial Code (38 Stat. 803) 2, 3–14
Act of September 14, 1922 (42 Stat. 837) 1, 2, 5, 19
Jurisdictional Act of February 13, 1925 (43 Stat. 942) 19
Judicial Code, Secs. 128, 238 . . . . . 2, 3–14, 18
Organic Acts for Porto Rico:
"Foraker Act" (31 Stat. 77) 3, 14–17, 18, 19, 21–24
"Jones Law" (39 Stat. 951) 3, 11–13
14–17, 18, 19, 21–24

PORTO RICAN STATUTES

Political Code, Sec. 294 6

In the Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 840.

JUAN G. GALLARDO, TREASURER,
Defendant-Appellant,

vs.

SANTINI FERTILIZER COMPANY,
Complainant-Appellee.

Appeal from the District Court of the United States for the District of Porto Rico, Transferred from the United States Circuit Court of Appeals for the First Circuit under the Act of September 14, 1922.

MOTION OF APPELLANT TO TRANSFER THE CASE BACK TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

And now comes the said Juan G. Gallardo, Treasurer of Porto Rico, defendant-appellant in the above entitled cause, and moves that this court transfer this case back to the Circuit Court of Appeals, First Circuit, for decision there upon the appeal originally prayed by this appellant to that court from the United States District Court for the District of Porto Rico. And as grounds for this motion appellant shows to the court here that said Circuit Court of Appeals, First Circuit, erred in transferring this cause from that court to this court under the Act of September 14, 1922 (42 Stat. 837) by decree of said Circuit Court of Appeals, December 18, 1926 (R. 34), because,

as this appellant respectfully says and submits to the court here, this appellant's original appeal herein was properly taken to said Circuit Court of Appeals, First Circuit, under Section 128, *Judicial Code, as amended January 28, 1915* (Sec. 2, Act of January 28, 1915, 38 Stat. 803), which was in force March 31, 1925, the date of the decree of the United States District Court for the District of Porto Rico, from which said appeal was prayed, as well as on April 7, 1925, when the appeal was allowed by the said District Court; and therefore that the said Circuit Court of Appeals erred in not retaining jurisdiction thereof, and erred in transferring this case to this Honorable Court; and, therefore, that this case should now be transferred back to said Circuit Court of Appeals, under said Act of September 14, 1922.

WILLIAM CATTRON RIGBY,
Lieutenant Colonel, Judge Advocate,
Attorney for Appellant.

GEORGE C. BUTTE,
Attorney General of Porto Rico,
Of Counsel.

BRIEF IN SUPPORT OF MOTION TO TRANSFER THIS CASE BACK TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

STATEMENT OF THE CASE.

This was a bill in equity in the United States District Court for Porto Rico filed by the appellee corporation, Santini Fertilizer Company, to enjoin the defendant-appellant, Treasurer of Porto Rico, from collecting certain Insular taxes levied against complainant. There is no diversity of citizenship; so that complainant's claim of federal jurisdiction rests upon the alleged federal questions involved. The District Court having entered its final decree in favor of the complainant-appellee on March 31, 1925, the defendant Treasurer appealed to the Circuit Court of Appeals, First Circuit, under Section 128 of the Judicial Code, as amended January 28, 1915 (Sec. 2, Act of January 28, 1915, 38 Stat. 803), which was in force on the date of the entry of the decree as well as on April 7, 1925, the date when the appeal was allowed by the District Court. The appeal was thus taken to the Circuit Court of Appeals under Section 128 of the Judicial Code (instead of to this court under Section 238 of that Code) because appellant understood appellee's bill of complaint as well as the decree of the District Court to proceed upon the theory that the tax in question was violative of the federal Organic Acts for Porto Rico (the Foraker Act and the Jones Act) and other related federal statutes,—as well as upon appellee's alleged constitutional rights under the United States Constitution. Upon the original argument in the Circuit Court of Appeals, appellee raised no question of the jurisdiction of that court, and did not suggest that the appellee should have directly come to this court instead of going to the Circuit Court of Appeals, and made no claim that only constitutional questions were involved; but on the contrary, in its original brief in that court (pp. 5–8, Complainant-Appellee's brief in the Circuit Court of Appeals herein; Appendix I, *infra*, pp. 21–24) stated to that court federal questions claimed to be involved under the organic acts for Porto Rico and other statutes of Congress; and argued those questions.

Accordingly, appellant now presents to the court here, and asks to file in connection with this motion, certified copies of the original briefs on both sides in that court, and of appellee's petition for rehearing therein and the briefs on both sides on the rehearing.

The Circuit Court of Appeals on March 3, 1926, handed down its opinion and entered its decree, reversing the decree of the District Court and remanding the case to that court with directions to dismiss appellee's bill of complaint for want of jurisdiction (R. 35–40). Thereafter on March 31, 1926, complainant-appellee filed its petition for rehearing in the Circuit Court of Appeals, and its brief in support thereof, in which, *for the first time*, it asserted (petition for rehearing, Point I, p. 1; brief in support thereof, pp. 1–3; certified copies thereof now presented to this court)that appellant's bill of complaint in the District Court raised no federal questions other than *constitutional questions*, and therefore that this appeal from the District Court should have been originally taken to this court under Section 238 of the Judicial Code as amended by the Act of January 28, 1915, and as in force on the dates of said decree of the District Court and of the allowance of the appeal therefrom by that court (March 31, 1925, and April 7, 1925, respectively), as a case involving only "*the construction or application of the Constitution of the United States*" and no other federal question, instead of to the Circuit Court of Appeals under Section 128 of the Judicial Code, as appellant had done.

The Circuit Court of Appeals on November 4, 1926, requested argument upon the petition for rehearing on two questions only, viz:

> "(1) Whether this appeal should have been taken to this court" (i. e., said Circuit Court of Appeals), "or directly to the Supreme Court"; and
>
> "(2) If the appeal should have been taken directly to the Supreme Court, whether the appeal was seasonably taken and may now be transferred to the Supreme Court, or must be dismissed."

Briefs having been submitted on both sides on both these questions, the Circuit Court of Appeals on December 18, 1926,

handed down its opinion on rehearing and entered its final decree (R. 32–34) setting aside its former decree of March 3, 1926, and transferring this case to this court under the Act of September 14, 1922 (42 Stat. 837).

The defendant-appellant, Treasurer of Porto Rico, now moves to transfer the case back to the Circuit Court of Appeals.

THE ISSUES PRESENTED BY THE COMPLAINANT'S BILL OF COMPLAINT IN THE TRIAL COURT.

Complainant-appellee's bill of complaint in the District Court alleged, *inter alia*, that complainant is a Porto Rico corporation (Par. 1, R. 1), and that (Par. 3, R. 1) the amount here in controversy "exceeds the sum of $3,000, exclusive of interest and costs"; that complainant is, and has been for several years, engaged in "buying and importing from the States of the United States and from foreign countries fertilizers and raw materials therefor, and in manufacturing commercial fertilizers, and in selling raw materials and the manufactured product"; that (Par. 6, R. 2) the defendant Treasurer of Porto Rico (or his predecessor in office) assessed complainant's taxable property on hand January 15, 1923, and, in so doing, included "one item of $296,761, the alleged value of merchandise in the hands of complainant" on that date; that (Par. 8, R. 2–3) part of such stock on hand on that date consisted of various amounts of nitrate of soda, sulphate of potash, muriate of potash, bone meal and cotton seed meal, of the aggregate value of $26,131,"

> "all of which merchandise, on January 15, 1923, was on the dock and warehouse of the complainant in the City of San Juan *in the original bags* in which same had been imported from Germany and France by complainant and which *consequently retained its character of imports* from foreign countries *and was* at the time *exempt as such from any property or other taxes imposed or which could be imposed by the government of Porto Rico*" (italics ours).

That (Par. 9, R. 3) the assessment was confirmed, on complainant's appeal, by the Board of Review and Equalization of Porto Rico; and that the defendant Treasurer (Par. 10, R. 3)

"threatens" to include in his assessment of complainant's property tax for the year 1924–1925,

> "*merchandise* in the hands of complainant on January 15, 1924, *in the original packages in which the same has been imported* by complainant from foreign countries and which had *not yet become mingled in the local commerce of Porto Rico*" (italics ours).

That (Par. 11, R. 3–4) defendant Treasurer has demanded payment of the 1923–1924 property tax based on such 1923 assessment, and threatens to take steps to enforce it. That—(in addition to allegations that defendant's method of assessment is, in respect to another unrelated matter,—viz., his interpretation of the phrase "average market value," as used in Section 294, Political Code of Porto Rico,—violative of local law)—defendant's acts "are *furthermore illegal and without warrant of law*" (Par. 13, R. 5),

> "in that said Political Code as construed by the taxing officers of the Government purports to tax goods imported from foreign countries *while still in the original packages in the hands of the original importer and before the same have become mingled in the commerce of the Island of Porto Rico;* all of which is *in violation of* the Constitution of the United States, and especially of *paragraph 3 of Section 8 of Article I* thereof" (italics ours);—that is to say, of the "commerce clause."

THE FOREGOING IS THE ONLY ALLEGATION OF A CONSTITUTIONAL QUESTION CONTAINED IN THE BILL OF COMPLAINT.

No issue was made in the District Court as to that Court's jurisdiction. The existence of the jurisdictional amount in controversy was, in fact, expressly admitted by defendant's answer (Par. 1, R. 9), and it was not questioned in the assignment of errors filed in the District Court (R. 18–20) on April 7, 1925, the date the appeal was allowed by that court, to the Circuit Court of Appeals (R. 20).

BRIEF

POINT I.

THIS APPEAL WAS PROPERLY TAKEN FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

The appeal was properly taken to the Circuit Court of Appeals under Section 128, Judicial Code, as amended January 28, 1915 (Section 2, Act of January 28, 1915, 38 Stat. 803), which was in force March 31, 1925, the date of the decree below, as well as on April 7, 1925, when the appeal was allowed.

A. Section 238, Judicial Code, as amended by the Act of January 28, 1915, and as in force on the dates of said decree and appeal, provided for direct appeals to and writs of error from the Supreme Court in the following cases, only, *under none of which this case falls*, viz:

1. "In any case in which the jurisdiction of the court is in issue."

"in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

2. From the final sentences and decrees in prize causes. (Nothing of that kind in this case.)

3. In any case that involves the *construction* or *application of the Constitution of the United States.*

4. In any case in which the constitutionality of any law of the United States is drawn in question.

5. In any case in which the validity or construction of any treaty made under the authority of the United States is drawn in question.

6. In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Sec. 238, Judicial Code, as amended by Act of Jan. 28, 1915 (38 Stat. 804; par. 1215, Comp. Stat. 1916).

B. Manifestly this case is not within either of the clauses of Section 238 which we have numbered above "2," "4", "5", or "6". It is not a prize case; the constitutionality of no law of the United States is here drawn in question; no treaty is involved; nor is the constitution or law of any State here claimed to be in contravention of the Federal Constitution.

C. Nor is this case within the *first* clause of Section 238. No "*issue*" was made below of the jurisdiction of the District Court; nor was any question of jurisdiction "*certified*" up from that Court for a decision.

It is only questions of jurisdiction thus "certified" up, upon which an "issue" was made in the District Court, that are covered by this clause of Section 238. This clause only

> "provides for direct appeals from the District Court to this Court in *certified questions* of jurisdiction of the District Court" (italics ours).
>
> *McMillan Co.* v. *Abernathy*, 263 U. S. 438, 441 (TAFT, CH. J.)
>
> *Only, if certified up by the District Court.*
>
> *Smith* v. *Apple*, 264 U. S. 274, 277.

D. There remains the question whether this appeal was required to go to the Supreme Court under the clause of Section 238 which we have numbered "3" above, viz., "In any case that involves the *construction* or *application of the Constitution* of the United States."

(a) The appeal was not required to go to the Supreme Court, even though a substantial constitutional question were presented by the pleadings, UNLESS that was the sole question presented supporting Federal jurisdiction.

If the case also involves other federal questions, then *the defeated party may elect* whether to go to the Supreme Court, or to the Circuit Court of Appeals.

> *Harris* v. *Rosenberger*, 145 Fed. 449, 451-452 (certiorari denied in *same case*, 203 U. S. 591).
>
> *Hooper* v. *Remmel*, 165 Fed. 336, 338.
>
> *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 406-408.

(For quotations from the opinions of the courts in the above cited cases, as to this point, see infra, "Appendix", pp. 25-27).

(b) A CONSTITUTIONAL QUESTION IS NOT PRESENTED, within the meaning of this clause of Section 238, by a "mere reference to a provision of the Federal Constitution" in the bill of complaint, nor by "the mere as-

sertion of a claim under it", UNLESS *the question thus presented be substantial and not frivolous, and not foreclosed by previous decisions of the Supreme Court.*

If the question sought to be raised is foreclosed by previous decisions of the Supreme Court, then the claim of it in the bill is "not substantial but frivolous."

> *Heitler* v. *United States*, 260 U. S. 438, 439 (TAFT, CH. J.).

So also, if, on the facts alleged in the bill, it is, under such previous decisions, *legally impossible* for any question of the construction or application of the Constitution to be really involved in the case.

Thus, even though the pleadings below explicitly state that the case involves the construction or application of the Constitution of the United States, yet, if the claim so stated be thus "frivolous", or has been so absolutely foreclosed by previous rulings of the Supreme Court as to leave no room for real controversy, then Section 238, Judicial Code, did not authorize an appeal to the Supreme Court because of such claim; and such an appeal, if taken, would be dismissed by the Supreme Court.

> *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344–346.
> *Eq. Lf. Assur. Soc.* v. *Brown*, 187 U. S. 308, 311 (WHITE J.).
> *Farrell* v. *O'Brien*, 199 U. S. 89, 100–101.
> *Merriam Co.* v. *Syndicate Pub. Co.*, 237 U. S. 618, 621.
> *Sugarman* v. *United States*, 249 U. S. 182, 184 (BRANDEIS, J.).
> *Piedmont Power & Light Co.* v. *Graham*, 253 U. S. 193, 195.
> *Heitler* v. *United States*, *supra*, 260 U. S. 438, 439 (TAFT, CH. J.), and *ibid*, 260 U. S. 703.
> (*For quotations from the foregoing cases, see infra*, "*Appendix*", *ff.* 27–31).

E. The only constitutional question sought to be presented by the bill of complaint here is the claim that the levy of Porto Rican taxes on goods imported from foreign countries "while still in the original packages in the hands of the original importer and before the same have become mingled in the commerce of the Island of Porto Rico" (Bill of Complaint, Par. 13;

R. 5) is violative of the "commerce clause" (Cl. 3, Sec. 8 of Art. I) of the Constitution.

(a) *But it is manifest,* upon a mere reading of this allegation, in connection with the facts alleged in the bill, that, under the settled doctrines of this Court, *it is legally impossible for any question of the construction or application of the "commerce clause" to be really involved in this suit;* since that clause is definitive of the correlative rights of the United States and of the individual States, and since no question of State power, as distinguished from Federal power, can possibly arise here, Porto Rico not being a State, and its legislature being merely an agent of the Congress. The validity of its acts, therefore, in so far as the questions presented by the facts alleged in this bill are concerned, is to be determined, not by a consideration of any of the clauses of the Constitution defining the correlative powers of the Federal Government and of the States, but solely by an examination of the Organic Act for Porto Rico and other acts of Congress, to determine whether or not the construction alleged to have been placed by the taxing officers (Bill of Complaint, Par. 13, *supra*, R. 5) upon the acts of the Porto Rican Legislature is violative of those acts of Congress.

That, as noted by the Circuit Court of Appeals in its original opinion of March 3, 1926, in this case (R. 38) is the only federal question really presented by the bill of complaint here.

But that is a question of the construction of acts of Congress, upon which appellant's appeal from the District Court was properly taken to the Circuit Court of Appeals under Section 128 of the Judicial Code, instead of to this Court. It is not a question involving either the construction or the application of the Constitution.

(1) That Porto Rico is, for these purposes, not to be classed as a State; and that its territorial Legislature is an agent of the Congress, *exercising,* within the limits of the authority delegated to it by Congress, *federal power,*—as contradistinguished from the sovereign powers of a State of the Union,—is well settled.

United States v. *Heinszen & Co.*, 206 U. S. 370.
Dooley v. *United States*, 182 U. S. 222.
Dorr v. *United States*, 195 U. S. 138.
Parsons v. *District of Columbia*, 170 U. S. 45, 56.
Binns v. *United States*, 194 U. S. 486.

Rafferty v. *Smith, Bell & Co.*, 257 U. S. 226.
Alaska v. *Troy*, 258 U. S. 101.
Balzac v. *Porto Rico*, 258 U. S. 298.

(b) Therefore, the allegation in paragraph 13 of the Bill of Complaint here (R. 5, *supra*), that the acts of the defendant and other taxing officers there assailed are violative of the "commerce clause" of the Constitution, is, within the meaning of the decisions of the Supreme Court hereinbefore cited (Point I–D–(b), pp. 8–9, *supra*), "not substantial but frivolous"; and was not sufficient to support (much less to *require*) a direct appeal to this Court from the District Court under Section 238 of the Judicial Code.

F. But, in any event—whether or not a substantial constitutional question may be held to be also presented by it—THE BILL OF COMPLAINT DOES PRESENT ON ITS FACE ANOTHER SUBSTANTIAL FEDERAL QUESTION ARISING UNDER FEDERAL LAWS (that is to say, under acts of the Congress), SUFFICIENT IN ITSELF TO SUSTAIN THE JURISDICTION OF THE FEDERAL COURTS; (if the requisite jurisdictional amount were involved); viz., *the question of the validity, under the Organic Act of Porto Rico and other acts of Congress, of the Porto Rican statutes in question*, as interpreted by the taxing officers of that Island—a question necessarily involving the construction and application of those Acts of Congress.

(a) The allegations of the bill (Pars. 5, 6, 8, 10, and the first clause of the last sentence of paragraph 13; R. 1–3, 5; and see "Statement of the Case," *ante*, pp. 5–6 hereof) fully present this question, entirely independently of the allegation of the alleged constitutional question in the concluding two and a half lines of paragraph 13. If the concluding clause (last two and a half lines) of said paragraph 13 be stricken out or disregarded as surplusage, the bill yet remains sufficient on its face to present this federal question under the organic law ("Jones Law") and other acts of Congress relating to the Insular Government.

Furthermore, the final decree of the District Court in so far as it relates to the "original packages" (Decree, pars. 4 and 5; R. 17) does not mention the "commerce clause", or any other clause of the Constitution; but may be said to be grounded upon the Organic Act and other laws of Congress (and will be

presumed to have been intended to be so grounded; since those laws are really applicable to the case, whereas the "commerce clause" of the Constitution is not.

(1) *If the District Court's decree had expressly found that the "commerce clause" of the Constitution was not involved,* and had then proceeded to make precisely the same findings that it does make (Decree, par. 4, R. 17) and the same decretal order which it now contains (*ibid*, par. 5, R. 17), then, manifestly, there would have been no constitutional question involved in the decree upon which this appellant could, as the "defeated party" complaining of the decree, base an appeal directly to the Supreme Court,—regardless of the allegation of a constitutional question in the bill. In that case, manifestly, the only way in which a direct appeal to the Supreme Court could possibly have been sustained would have been upon a cross appeal by complainant, complaining of that part of the decree finding against it on that specific question,—viz. of such supposed express finding that the "commerce clause" was not involved. There is no such cross appeal here. Complainant (appellee) makes no complaint of any part of the decree.

Yet in effect this decree actually does exactly the same thing that would have been effected by such an express finding as above supposed. It wholly omits to make any finding that, as the bill had alleged, the acts of defendant in question were violative of the "commerce clause", or of any other clause, of the Constitution.

That omission is significant, and must be presumed to express the deliberate considered determination of the trial judge. In other words, he finds in effect that the acts alleged are not, as was claimed by the complainant in the concluding clause of paragraph 13 (R. 5) of its bill of complaint, really violative of the "commerce clause" of the Constitution; but he does find the facts substantially as alleged in the bill (Decree, par. 4, R. 17), and proceeds to give the complainant a decree perpetually enjoining defendant from assessing against the complainant

> "any property tax upon fertilizers or other goods unsold in the hands of complainant in the original packages in which the same were imported by complainant from foreign countries." (Decree, par. 5, R. 17.)

Necessarily, that means that the District Judge rested his decree upon the general laws in force applicable to Porto Rico,

viz., upon the Organic Act and other acts of Congress. If he had meant to rest it solely upon the alleged violation of the "commerce clause" claimed in the bill of complaint, he would undoubtedly have gone along with the bill and made the corresponding finding, *which is significantly omitted from the decree.*

In other words, so far as any alleged violation of the "commerce clause" was concerned, the finding of the District Court was *with the defendant* (appellant); and not with the complainant. *Therefore, as to that question, which would have been the sole possible basis for a direct appeal to the Supreme Court, the court's finding having been with him and not against him, appellant had no ground for such direct appeal to the Supreme Court.* There was, as to that question, nothing for him to complain of,—no finding against him. And, therefore, no constitutional issue for him to take to the Supreme Court.

(b) Therefore, since this independent federal question, under the Organic Act and other acts of Congress, is thus properly presented on the face of the bill and upon the decree of the District Court, it follows that, under the authorities hereinbefore cited (Point I—D-(*a*), p. 8, *supra*), this appeal was properly taken to this court under Section 128 of the Judicial Code, instead of directly to the Supreme Court under Section 238; because:

(1) If the alleged constitutional question hereinbefore in sub-point "E" of this Point (pp. 9-11, *ante* of this brief) discussed, be held to be (contrary to appellant's belief) actually a substantial constitutional question properly presented by the bill; then, in view of the independent federal question arising under the acts of Congress thereby also presented, *the defeated party had his election whether to appeal from the District Court directly to the Supreme Court or to the Circuit Court of Appeals*, and properly exercised that election by the appeal to the latter court; and, on the other hand,

(2) If the alleged constitutional question sought to be presented by the bill be held to be—(as the appellant respectfully submits it should be)—not a substantial constitutional question, for the reasons hereinbefore in sub-point "E" (pp. 9-11, *ante*) of this point of this brief discussed,—or, in any event, to have been eliminated by

the final decree below, so far as any ground for appeal by the defendant (appellee) is concerned (sub-point "F"—(*a*)—(1), pp. 12–13, *ante*),—then there existed (and exists) no ground for a direct appeal to the Supreme Court under Section 238 of the Judicial Code, and the appeal was necessarily, and properly, taken from the District Court to the Circuit Court of Appeals, under Section 128.

G. *In either event it follows that the appeal was properly taken to the Circuit Court of Appeals.*

POINT II.

APPELLEE IN ITS BRIEF IN THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, IN THIS CASE (certified copy of briefs in the Circuit Court of Appeals filed in this court) EXPRESSLY STATED THAT THE CONSTRUCTION OF A FEDERAL STATUTE,—THE ORGANIC ACT OF PORTO RICO (39 Stat. 951, *et seq.*),—WAS HERE INVOLVED.

> "Brief for Complainant-Appellee" in the Circuit Court of Appeals (certified copy filed in this court), pp. 5–8; pertinent portion reprinted in Appendix I. hereto, pp. 21–24, *infra*.

(A) Appellee in that brief in the Circuit Court of Appeals stated, under the subheading "APPLICABILITY OF RULE TO PORTO RICO", that:—

> "It is an academic question whether the violation is one of the federal constitution in so far as it is extended to Porto Rico, *or of the Organic Act* in so far as it adopts parts of the federal constitution.
>
> "*It is admitted that Congress* • • • *can authorize* THE LEGISLATURE OF PORTO RICO TO TAX IMPORTS IN THE ORIGINAL PACKAGES. *The first real question is whether Congress has granted* to the Legislature of Porto Rico the power • • • •.
>
> "Certain sections of the Foraker Act and Jones Act • • • vest certain legislative power in the Insular Legislature. Other sections, • • • extend federal laws to Porto Rico. *These sections must be construed together.*" (p. 5) • • • •
>
> "*The question is whether Congress* • • • *meant* • • • *and whether Congress intended* to authorize taxes interfering with foreign commerce.

"*For the answer to this question we must examine* not merely the restrictions in Sections 15, 32 and 38 of the Foraker Act and in Sections 3, 37 and 57 of the Jones Act, but also those sections which extend federal laws to Porto Rico." (p. 6) * * *

"From the specific exception of internal revenue laws in Section 9 of the Jones Act, one would suppose * * * *.

"Congress has apparently desired * * *. Congress certainly never intended that the Legislature of Porto Rico could * * * *." (p. 7) * * * *

"In the case of Porto Rico, Congress has covered the case of imports from foreign countries * * *. It covered the case of exports by the specific provisions of Section 38 * * *. What more should it reasonably be required to do to *indicate its intention that* * * * * *. Taxes * * * are forbidden to Porto Rico by Section * * * of the Foraker Act as continued by Section 58 of the Jones Act. * * * *.

"* * * *. The intention of Congress in the Organic Act and preceding federal statutes seems clearly to have been * * *. At least, *Congress certainly never intended* the Insular Government to have more power over matters affecting foreign powers than a sovereign State of the American Union." (p. 8) (*italics ours*).

Brief of complainant-appellee in the Circuit Court of Appeals, supra, pages 5, 6, 7, 8; Appendix I, hereto, *infra*, pp. 21-24.

It is perfectly clear, therefore, *that complainant-appellee*, when it argued this case on the merits in the Circuit Court of Appeals, *believed that questions of the construction of those acts of Congress*, viz., the two organic acts of Porto Rico, the former act of April 12, 1900, known as the Foraker Act (31 Stat. 77,), and the present organic act known as the Jones Act (39 Stat. 951), *were presented by their bill of complaint, and were involved in the case.*

In other words, it is apparent that complainant-appellee was, up to that time, in agreement with defendant-appellant, and with the Judge of the District Court of Porto Rico, in construing the bill as involving the construction of these

federal statutes as well as the alleged constitutional question;—(*if it really considered that any substantial federal question was actually involved at all.* Presumably appellee's counsel drafted the form of the final decree of the District Court of March 31, 1925, R. 16–17, which, as hereinbefore pointed out, *ante*, pp. 12–13, does not mention any constitutional question.)

(B) It appears from the record in this case that *the first time that it ever occurred to appellee, or its counsel, to claim that its bill of complaint herein was not intended to rely upon any question of construction of the organic acts of Porto Rico* or other federal statutes (but to involve only the alleged constitutional questions, and no other federal questions) *was after this cause had been argued and submitted to the Circuit Court of Appeals and after it had been decided adversely to appellee by the Circuit Court of Appeals* by the latter court's opinion and decree of March 3, 1926; when, by its petition for rehearing dated March 31, 1926, appellee FOR THE FIRST TIME raised the question of jurisdiction of the Circuit Court of Appeals on the alleged ground that its bill of complaint in the District Court presented only a constitutional question and did not present any question of the construction of any federal statutes or other federal question (p. 1, Appellee's petition for rehearing dated March 31, 1926, and "Point I", pp. 1–3, Appellee's "Brief on Petition for Rehearing and for Dismissal of Appeal" also dated March 31, 1926; certified copies of such petition and brief included in the "Certified copies of Briefs filed in the Circuit Court of Appeals" filed in this court herewith.

THAT WAS THE FIRST TIME THAT IT EVER APPEARS TO HAVE OCCURRED TO APPELLEE OR ITS COUNSEL TO CLAIM THAT ITS BILL OF COMPLAINT DID NOT INVOLVE QUESTIONS OF THE CONSTRUCTION OF FEDERAL STATUTES. IT WAS THEN TOO LATE. APPELLEE WAS THEN ESTOPPED TO MAKE SUCH A CLAIM.

It is submitted that a party cannot at such a late date deprive a court of jurisdiction by changing the whole theory of its case. Even if, in the first instance, in the trial court, the bill of complaint might have been said to be capable of being so read as to rest complainant's case solely upon the alleged consti-

tutional question,—and not to involve in any way the construction of the Organic Acts or other acts of Congress, and thus not to raise any federal questions other than the constitutional questions;—yet, complainant as well as appellee, and also the Judge of the District Court, having understood it to be intended to raise the other federal questions as well,—viz., of the construction of the federal statutes, the Organic Acts for Porto Rico and other acts of Congress,—and the defendant-appellant, the defeated party in the District Court, having in good faith on the strength of that understanding appealed to the Circuit Court of Appeals instead of to this court; and the complainant-appellee having in the Circuit Court of Appeals joined issue on the merits and specifically admitted in its brief, as hereinabove pointed out, that questions of the construction of federal statutes (as well as the alleged constitutional questions) were there involved, and having urged its construction of the Organic Acts and other federal statutes in that court as a ground for sustaining the decree of the District Court,—without any suggestion whatever of those questions not being there involved, or of the case having been wrongly taken to that court,—and appellee having been defeated in that court; *it cannot afterward,*—after having thus misled the opposing party, as well as the District Court, and the Circuit Court of Appeals on the first hearing, into believing that it intended to present questions of the construction of the federal statutes in its bill of complaint, and after having thus gotten the benefit of a decree in the District Court apparently based on that understanding, and after having also thus gotten the benefit of an argument and a trial in the Circuit Court of Appeals upon that theory,—and having been there defeated,—*now turn around and ask that everything thus done in the Circuit Court of Appeals be disregarded, and that it now have a new appellate review in this court,* upon the theory that it did not mean to present by its bill of complaint the questions of the construction of the federal statutes which it had nevertheless elaborately argued in the Circuit Court of Appeals.

IT IS SUBMITTED THAT A LITIGANT CANNOT THUS BLOW HOT AND BLOW COLD AT THE SAME TIME WITH THE FEDERAL COURTS

OF REVIEW. Section 238 of the Judicial Code was not intended as such a trap for an appellant.

POINT III.

APPELLEE ITSELF ADMITTED IN THE CIRCUIT COURT OF APPEALS THAT NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS HERE INVOLVED.

It deliberately admitted on page 5 of its original "Brief of Complainant-Appellee" in the Circuit Court of Appeals (certified copy herewith presented to this court as hereinbefore stated, referred to *ante*, Point II, p. 14 hereof; and portion headed "Applicability of Rule to Porto Rico", reprinted in Appendix I hereto, pp. 21-24, *infra*), that:

> "*It is admitted* that Congress with its power to extend or withhold the application of parts of the federal constitution in Porto Rico, CAN AUTHORIZE THE LEGISLATURE OF PORTO RICO TO TAX IMPORTS IN THE ORIGINAL PACKAGES."

In view of that express admission it is plain that the alleged "constitutional questions" purporting to be presented by the bill of complaint here are, in the language of this court in the *Heitler* case, "NOT SUBSTANTIAL BUT FRIVOLOUS."

> *Heitler* v. *United States*, *supra*, 260 U. S. 438, 439 (TAFT, CH. J.).

It is manifest that, on appellee's own statement in its own brief in the Circuit Court of Appeals in this case, it never really believed in them itself. The only substantial federal questions involved in the suit are those of the construction of the federal statutes, viz., of the former and the present Organic Acts of Porto Rico and the related acts of Congress,—which appellee argued in its original brief in the Circuit Court of Appeals, and as to which, as the Circuit Court of Appeals held in its opinion and decree of March 3, 1926, the requisite jurisdictional amount is not involved.

CONCLUSION.

It is therefore respectfully submitted that the Circuit Court of Appeals, First Circuit, erred in transferring this cause to this court, because:

(1) No substantial constitutional question is here involved;

(2) Even if it be held that a substantial constitutional question is involved, then other federal questions of the construction of statutes of Congress,—the Organic Acts of Porto Rico and other federal statutes,—are also involved; so that appellant had its *election* to take its appeal, as it did, to the Circuit Court of Appeals instead of to this court; and

(3) Appellee is estopped by its own conduct in the District Court, and in the Circuit Court of Appeals in its original brief in this case, from denying that it intended to present questions of construction of federal statutes (as well as constitutional questions) by its bill of complaint in this case.

This case should therefore be transferred back to the Circuit Court of Appeals, under the Act of September 14, 1922, and the saving clause in the jurisdictional act of February 13, 1925.

Salinger v. *United States*, 272 U. S. 542, 549.

Respectfully submitted,
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